Office of Chief Counsel
Internal Revenue Service
memorandum

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to: W. Ricky Stiff
Chief, Excise Tax Program

from: Frank A. Falvo
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(Small Business/Self-Employed)

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subject: [redacted]
Request for Advice

This responds to your request for assistance dated April 1, 2005. This memorandum should not be cited as precedence.

ISSUE

Whether the taxpayer is the importer for purposes of the excise tax imposed by I.R.C. § 4161.

CONCLUSION

The taxpayer is not the importer.

FACTUAL BACKGROUND

All factual information set forth herein has been provided or verified by the excise tax agent.

The taxpayer, [redacted], is engaged in the business of manufacturing and distributing certain [redacted] equipment, [redacted]. The taxpayer manufactures some [redacted] and contracts with third parties for the manufacture of [redacted] sold by the taxpayer are labeled with its trademark name. In or around [redacted] the taxpayer began purchasing [redacted] manufactured in [redacted].

[redacted] is a domestic importer of [redacted] equipment headquartered in [redacted] with additional offices in [redacted]. The owners of [redacted] have extensive experience in the sport fishing industry. [redacted] purchases [redacted] equipment from approximately [redacted] manufacturers in [redacted]. It imports this equipment and sells to [redacted] domestic customers.

employs individuals in the United States and individuals in The primary function of employees is to work constantly with the various manufacturers of products purchased by to ensure (i) the production of such products in time to meet the delivery expectations of and its customers and (ii) the conformance to specifications and the quality of such products. actively and continuously promotes its products to its customers and potential customers by attending trade shows and making sales calls.

In a representative of the taxpayer met one of the owners of at an industry trade show. The owner showed the taxpayer samples of its imported . Thereafter, as a result of this meeting, the taxpayer began purchasing certain from These are all manufactured in

Some of the purchased from by the taxpayer are "off the shelf" which require little or no modifications other than the labeling of such rods with logo. purchased by the taxpayer are designed and manufactured based upon specifications provided by the taxpayer.

To order from the taxpayer transmits a purchase order to specifying the types and quantities of desired by the taxpayer. Like most customers, the taxpayer is required to purchase at least of each type of from and at least per order.

Primesource negotiates a purchase price for the from its manufacturers. Then, on an annual basis, establishes the sales price of . In doing so, takes into consideration all of its anticipated expenses, which include its cost of purchasing the from the manufacturers and the expenses associated with the shipment, importation, and delivery of the In establishing the sales price of a marks up its anticipated expenses to the extent required to yield a projected % gross profit margin. If actual expenses are less than those projected, would realize a profit greater than anticipated. Conversely, if actual expenses exceed those anticipated by it, would realize less than its anticipated profit or even sustain a loss on the transaction. The taxpayer does not know the identity of the manufacturers.

Upon receipt of a purchase order from the taxpayer, orders from one of its manufactures. Title to passes from the manufacturer to when they are shipped from must pay for within days thereafter. It takes approximately days from the date of shipment for to arrive to their destination. The taxpayer must pay within days after are delivered to the taxpayer or the taxpayer's customer. Since must pay for within days following the date of shipment,

[redacted] effectively finances the taxpayer's purchase of [redacted] for at least [redacted] days.

[redacted] pays all shipment (including freight charges and insurance premiums), importation (including customs duties, entry fees, harbor maintenance fees, etc.), and delivery expenses with respect to the [redacted] it sells to the taxpayer. The [redacted] are initially delivered to a bonded warehouse in the United States. [redacted] causes [redacted] to clear customs, removes them from the warehouse, and delivers them to the taxpayer or the taxpayer's customers. Once [redacted] are delivered to their final destination, title passes from [redacted] to the taxpayer. If a [redacted] is defective, [redacted] pays the shipping cost to have a replacement [redacted] sent from [redacted] to the taxpayer.

Although [redacted] regularly promotes the [redacted] equipment it purchases from [redacted] and assists its customers with marketing plans to introduce products purchased from [redacted] does not promote the sales of specific products containing the taxpayer's trademark. All promotions concerning the taxpayer's products are handled by the taxpayer.

DISCUSSION

Section 4161 imposes a tax on the sale of any article of [redacted] equipment by the manufacturer, producer or importer. Section 48.4161-1(c) provides that the tax imposed by section 4161(a) is payable by the manufacturer, producer, or importer who makes the sale.

Section 48.0-2(a)(4)(i) defines an importer as any person who brings a taxable article into the United States from a source outside the United States, or who withdraws a taxable article from a customs bonded warehouse for sale or use in the United States. If the nominal importer of the taxable article is not its beneficial owner (for example, the nominal importer is a customs broker engaged by the beneficial owner), the beneficial owner is the importer of the article and liable for tax on its sale or use of the article in the United States. Section 48.0-2(a)(5) defines sale as an agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership) in goods to the buyer for a consideration called the price, which may consist of money, services, or other things.

Rev. Rul. 56-409, 1956-2 C.B. 769, holds that a person who withdraws taxable articles from a customs bonded warehouse for sale or use in the United States is the "importer" for purposes of the manufacturers excise taxes. This ruling was amplified by Rev. Rul. 67-209, 1967-1 C.B. 297, which held that it is necessary to look through the form to the substance of the transaction to determine whether the nominal importer actually functions as a typical import merchant, or merely serves in a representative capacity, charged only with the responsibility for bringing the goods into the commerce of the United States, after a sale contract has been negotiated independently by the principals involved.

In Rev. Rul. 68-197, 1968-1 C.B. 455, the Service held that an importer is the person who as principal and not as agent arranges for, or is the inducing and efficient cause of, the goods being brought into the United States for the purposes of sale or use by him. The passing of title to the goods, either at the time of shipment or upon arrival in this country, is not controlling.

In Rev. Rul. 82-40, 1982-1 C.B. 175, X is a foreign corporation that manufactures various fishing equipment. P, also a foreign corporation, unrelated to X, is a trading company engaged in the export business. P is the exclusive exporter of X's products. S, a domestic subsidiary of P, is engaged in international trade. An arrangement was made under which S acts as the importer of X's products in the United States and sells them to Y, a corporation created to act as the exclusive domestic wholesale distributor of X's fishing equipment in the United States.

When Y places an order with S, S has the right to accept or reject the order and to limit the quantity ordered. S maintains no inventory of fishing equipment and imports rods and reels only as they are needed by Y. The price of the goods to Y is determined at the time an order is accepted, and the risk of any fluctuation in price or importation cost is borne by S. In addition, S assumes any risk for defective merchandise delivered to Y and must seek restitution from its supplier, P. Title to the fishing equipment passes to Y at the port of entry after it has cleared customs. Y must pay S for the merchandise within 120 days of the issuance of the bill of lading. S incurs the risk of price changes after acceptance of Y's order. The entire cost of importation, including credit arrangements, is borne by S. The Service ruled that S is the inducing and efficient cause of the importation of the fishing equipment and is the importer of the rods and reels.

The ruling states that generally, the basis for computing the manufacturer's excise tax is the actual selling price of the article. If, however, an article is sold, otherwise than through an arms length transaction at less than a fair market price, the tax must be based on a constructive sale price under § 4216(b). Section 48.4216(b)-2(e) of the regulations states that a sale is considered to be otherwise than at arm's length if (1) one of the parties is controlled (in law or in fact) by the other, or there is common control, whether or not such control is actually exercised to influence the sale price, or (2) the sale is made under special arrangements between a manufacturer and a purchaser. A special arrangement exists when there are factors other than control that indicate there is no adverse economic interest between the parties to a transaction. A lack of adverse economic interest does not necessarily exist because all parties to a transaction may benefit in some way, for example, having an assured market or source of supply or earning a profit.

The factual circumstances in the case at issue are similar to the facts in Rev. Rul. 82-40. [redacted] is engaged in the business of importing [redacted] equipment. It has numerous suppliers and domestic customers. It is not in any way controlled by the taxpayer; [redacted] independently negotiates with its suppliers and customers. The

taxpayer has no direct contact with the [redacted] manufacturers and states it does not even know their identities. [redacted] bears the risk of loss on the transaction with the taxpayer. It incurs all expenses relating to product costs, shipment, importation and delivery.

In Corex Corporation v. United States, 524 F.2d 1017 (9th Cir. 1975), the court determined that a party was not the importer because it performed no substantial promotional activities, bore none of the usual risks associated with shipments in transit, performed no function other than as a conduit and earned little profit. The court in Import Wholesalers Corp. v. United States, 368 F.2d 577, 583 (Ct. Cl. 1966), stated that the determination of who is the importer does not turn on technical rules such as the law of sales, but rather on the realities as to who arranges as principal and not as agent for the articles to be imported into the United States. The court disregarded the intermediary because its only act was to place the importer's order with the seller.

In contrast [redacted] performs a substantial function in the importation of the [redacted] After receiving an order from the taxpayer (or one of its other customers), [redacted] purchases the [redacted] from a [redacted] manufacturer, and arranges for and pays all shipping costs, duties, tariffs, etc. [redacted] clearly bears the risk associated with the importation of the rods. It charges the taxpayer a fixed amount for the goods, which amount is determined annually. If it miscalculates its anticipated expenses, [redacted] suffers the resulting loss. According to the taxpayer, during [redacted] incurred unanticipated shipping expenses of $[redacted] on one transaction because certain production delays caused by the [redacted] manufacturer of [redacted] which [redacted] sold to the taxpayer necessitated expensive air shipment of the [redacted] This unanticipated expense was borne solely by [redacted] and caused it to realize a loss on the transaction. In addition, [redacted] also bears the risk of loss from the late payment or nonpayment by the taxpayer. The taxpayer states that in [redacted] lost over $[redacted] in anticipated profits on one transaction because of the taxpayer's late payment. [redacted] also pays all shipping and handling costs related to the replacement of defective [redacted] delivered to the taxpayer. Unlike the agents who handled the importation of goods in the Corex and Import cases, [redacted] is not merely a conduit or nominee for the taxpayer, but is the principal responsible for importing [redacted] into the United States.

The factual situation in this case also resembles the facts set forth in Sony Corp. of America v. United States, 428 F.2d 1258 (Ct. Cl. 1970). In that case, Sony of Tokyo ("Tokyo") designated Agrod Corp. as the exclusive distributor of its products in the United States. Agrod subdistributed to Sony of America ("America"). America would place an order with Agrod, who then placed an order with Tokyo. Agrod arranged to deliver or store the merchandise and made all payments associated with freight, customs, insurance and bonds.

The court held that Agrod was the importer. In doing so, the court looked to Tokyo's reliance on Agrod's knowledge of the market, its promotional activities and

efforts in introducing new products, the risk of loss borne by the agent, and the inclusion of the agent in the chain of title.

[redacted] has extensive [redacted] equipment experience and is engaged in the business of importing [redacted] equipment. [redacted] acquired title to the goods upon their shipment from [redacted] and maintained title until delivered to the taxpayer. This is [redacted] standard commercial practice that applies to all of its imported goods.

In Sony, one factor relied upon by the court was that the importer provided promotional activities with respect to the imported products. Admittedly, [redacted] did not promote the products which bore the taxpayer's logo. We do not believe that the absence of this factor is fatal to the determination that [redacted] is the importer. The taxpayer choose to promote and market its own products. It apparently made a business decision that it did not need [redacted] assistance in this regard. [redacted] did, however, regularly and actively promote the other products which it imported. The absence of this single factor is not controlling in determining whether [redacted] is the importer. That is but one factor among the totality of the circumstances that must be considered to make the appropriate determination.

We believe the facts and circumstances relating to the transactions between the taxpayer and [redacted] reflect arms-length dealings. [redacted] acted not merely as an agent or conduit for the taxpayer, but as the inducing cause of the importation.

Based upon the foregoing, we believe that [redacted] not the taxpayer, is the importer of the [redacted] for purposes of the tax imposed by § 4161.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please contact me at (412) 644-3417 if you have any questions.

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